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In the Supreme Court of the United States

OCTOBER TERM, 1958

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

EPHRAM NESTOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR APPELLANT IN OPPOSITION TO MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
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INDEX

Cases: Page

Galvan v. *Press*, 347 U.S. 522 4

Harisiades v. *Shaughnessy*, 342 U.S. 580 3

Knauff v. *Shaughnessy*, 338 U.S. 537 3

84923S—59

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The motion to affirm asks the Court to affirm summarily, without the benefit of briefs on the merits or oral argument, the judgment of a single-judge District Court invalidating a significant provision of an Act of Congress affecting the nation's social security program. It invokes (Motion 4–5)[1] as reasons for such summary affirmance arguments which are unrelated to the articulated basis of the District Court's action, and which, though urged in the District Court, failed (so far as the opinion reflects) to win that

[1] "Motion" refers to the motion to affirm, and "J.S." to the jurisdictional statement.

court's acceptance.[2] Finally, it wholly fails to meet—indeed, does not mention—the issue on which the judgment below turned, *i.e.*, whether one who has commenced to receive monthly social security benefits acquires a vested or "property" right to the continued receipt of such benefits of such a nature that they may not be suspended upon the occurrence of an event (here, deportation) which Congress, by legislation of general applicability antedating the recipient's initial eligibility for such benefits, has provided shall result in such suspension. For these reasons, we submit, the motion to affirm should be denied.

1. As pointed out in the jurisdictional statement (J.S. 5, 8–9), the essence of the decision below was that appellee was denied due process in being deprived of what the court referred to as a "fully accrued" "property right"—the right to the continued receipt of social security benefits once they have been awarded—"through a legislative enactment which took such benefits because of deportation" (J.S., App. A, p. 41). The judgment in no way turned, as we further pointed out (J.S. 18), on the distinction which Section 202(n) of the Social Security Act makes between different classes of deportees. Yet appellee's motion to affirm rests on precisely this distinction and,

[2] The District Court set forth in its opinion, without comment, the substance of the arguments now relied on by appellee for summary affirmance (J.S., App. A, pp. 23–25). As we point out in the text, however, the court based its decision on other grounds, with no intimation that it thought there was any merit to the arguments now advanced by appellee as justifying the judgment.

as we have said, wholly fails to meet the issue on which the court's judgment was based.

2. Appellee argues that "what the statute actually does is to penalize appellee because he had been, according to an administrative finding, a member of the Communist Party years before the enactment of the deportation statute and of Section 202(n)" (Motion 4). But, as we have pointed out (J.S. 6–7, 18–19), the provision invalidated by the judgment below applies, with a few exceptions, to all deported aliens. Whether (as appellee argues) the categorization of deported persons which the statute creates is based upon a congressional purpose to "penalize" those to whom the suspension provisions apply, and whether such a purpose if present would invalidate the suspension provisions although they would be valid if generally applicable to all deportees, are questions which, we submit, warrant plenary consideration and should not be disposed of summarily on a motion to affirm.

The great power of Congress with respect to the admission and deportation of aliens is well settled. *E.g., Knauff* v. *Shaughnessy*, 338 U.S. 537, 542; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587. Congress can validly create classes of aliens who shall be eligible to enter this country and classes which shall be excluded, and can likewise classify aliens in this country into those who shall be deported and those who shall be permitted to remain. Similarly, we perceive no constitutional barrier to Congress' appropriately classifying deported aliens into those who shall be permitted to continue to receive social security benefits which they have once begun to receive, and

those who shall have their benefits suspended upon deportation—once it is recognized (see J.S. 8–13) that Congress could constitutionally prohibit the payment of social security benefits to all deported aliens. To argue, as does appellee, that for Congress to declare as a matter of policy that certain categories of deported aliens, but not others, shall have their social security benefits suspended upon deportation is "penal" (and hence illicit) is no more sound than to argue that Congress cannot create classes of deportable aliens because the effect is to "penalize" such classes. The suspension of social security benefits need be no more "penal" in character than the act of deportation itself; and the non-penal nature of deportation is well settled. *Galvan* v. *Press*, 347 U.S. 522, 531.

For the foregoing reasons, it is respectfully submitted that the motion to affirm should be denied, and that probable jurisdiction should be noted.

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